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IN THE

Supreme Court of the United States

October Term, 1964.

No. 371.

ALVIN H. FRANKEL, Guardian of the Estate of Carol Tillman, a minor,

Petitioner,

v.

EDWARD HOGE VICK, M.D. and CLARENCE C. BRISCOE, M.D.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

ALVIN H. FRANKEL, Guardian of the Estate of Carol Tillman, a minor, by his attorney, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on May 14, 1964.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania dismissing plaintiff's Motion for New Trial is set forth in the Appendix to this Petition. It is otherwise unreported. The per curiam opinion of the Court of Appeals is set forth in the Appendix to this Petition and is reported at 331 F. 2d 309.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 14, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether petitioner's constitutional right to trial by jury has been violated, and whether she has been denied due process of law, when she was barred from the courtroom by the U. S. Marshal on order of the district court half way through the trial of her action before a jury.

CONSTITUTIONAL PROVISIONS.

The constitutional provisions involved are the Fifth and Seventh Amendments.

The Fifth Amendment reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Seventh Amendment reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

STATEMENT OF THE CASE.

This is a malpractice action against two physicians instituted on behalf of an infant plaintiff.

At various times during the trial the defendants requested that the court remove the minor plaintiff from the courtroom because her presence prejudiced them (51a, 234a-235a). The court denied these requests because the minor had a right to be present (52a) and the court had no right fundamentally to bar any litigant from the courtroom or the courthouse (236a). However, on an early occasion the court suggested to plaintiff's counsel that the child not be kept in the courtroom at all times (51a), and indicated that her counsel's request that she be present at the trial of her own case would be considered by the court when reviewing other features of the case (51a).

In response to this suggestion, counsel kept the minor plaintiff out of the courtroom during portions of the first four days of the trial. During this period of time—including plaintiff's actual appearances in the courtroom—the record shows not one complaint by either the court or defendants concerning plaintiff's conduct or decorum.

On the morning of the fifth day of trial, at a time when plaintiff was actually in the corridor outside of the courtroom, the court ordered the Deputy U. S. Marshal to remove the child and detain her at the south end of the courthouse for the remainder of the trial (250a-251a). This was done despite counsel's motion to allow plaintiff to attend her own trial. The motion was summarily denied (250a).

Plaintiff's exclusion from her own litigation was predicated on the court's belief that the jury had an understanding of her condition (even though the medical evidence was still going on) and that her presence *might* prejudice the jury against the defendants in some way, although neither the court nor defense counsel ever articu-

lated any rationale for this "feeling" and none appears in the record (250a).

The testimony continued for four more days and into evening sessions after plaintiff had been banished. After eight full days of trial, the jury required three hours and twenty minutes, including their dinner period, to reach a verdict of "not guilty" (corrected to "in favor of the defendants") (332a).

The District Court entered judgment on February 1, 1963, and denied plaintiff's Motions for New Trial on September 23, 1963 (337a-338a). On May 14, 1964, the Court of Appeals for the Third Circuit affirmed the entry of judgment in a per curiam opinion noting only that "On review of the record we find no error." 331 F. 2d 309.

REASONS FOR GRANTING WRIT.

1. The District Court's exclusion of the minor plaintiff from the courtroom and placing her in the custody of a Deputy U. S. Marshal was a denial of her right to trial by jury in violation of the Seventh Amendment to the Constitution of the United States and a denial of due process as guaranteed by the Fifth Amendment.

2. That same action by the District Court and the affirmance, per curiam without opinion, by the Court of Appeals are in square conflict with the opinion of this Court in *Shield[illegible] United States*, 273 U. S. 583, 71 L. Ed. 787 (19[illegible]), with the decision of the Court of Appeals for the Eighth Circuit in *Chicago Great Western Ry. Co. v. Beecher*, 150 F. 2d 394 (8th Cir. 1945), with the decision of the Third Circuit itself, in *Arrington v. Robertson*, 114 F. 2d 821 (3d Cir. 1940), and with a host of state court decisions.

3. This denial of a constitutional right and the resultant conflict with decisions of this and other courts involves

a matter of fundamental importance in the administration of the Federal judicial system. It is the first decision of its kind and creates a very dangerous precedent to the rights of parties litigant. It converts a constitutional right into a privilege in the discretion of the trial judge. Settlement of this question is plainly in the public interest.

Constitutional Rights Have Been Violated.

The constitutional guarantee of the right to trial by jury has roots deep in our constitutional antecedents. It dates from the Magna Carta of 1225 whose Chapter 29 guarantees a man's person and property against invasion "except by a legal judgment of his peers or by the law of the land."

This deep-rooted foundation of the right demonstrates the reason for the rule that although the right might be voluntarily waived, every reasonable presumption is indulged against a waiver. *Hodges v. Easton*, 106 U. S. 408, 412 (1883). This was the background of the right so integral that this Court (notwithstanding the early erosion of the right in state criminal practice) noted that if a defendant was in custody he must be personally present at every stage of the trial where his substantive rights might be affected by the proceedings against him. *Hopt v. Utah*, 110 U. S. 574, 579 (1884).

The *right* to trial by jury in civil cases must contemplate the *presence* of the party in interest. Without such, the right is naked and meaningless. It is the Constitution that guarantees the right of a party to be personally present at each and every stage of a judicial proceeding where his substantive rights might be affected.

The right is so fundamental in nature that its constitutional roots seem to be taken for granted. Few courts have bothered to do more than state, categorically and unequivocally, that a party to a suit cannot be excluded from its trial. Cases are legion which so hold. Yet the constitutional roots are clear.

In *Baltimore and Carolina Line, Inc. v. Redman*, 295 U. S. 654, 657, 79 L. Ed. 1636, 1638 (1935), this Court said:

> "The aim of the [Seventh] amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and *issues of fact are to be determined by the jury . . .*" (Emphasis added.) [1]

In light of the decisions below, petitioner urges that it is vital to the preservation of the constitutional rights to jury trial and to due process that this Court review this case and reiterate clearly that these constitutional rights include the right of a party litigant to be present at all stages of the trial of his case.

To hold otherwise, as was done here, violates the Constitution and relegates the "right" specified in the Seventh Amendment to a mere privilege. It means that in any case and for whatever reason, good or bad, flimsy or substantial, any court can determine for itself whether to exclude the plaintiff—the party whose trial by jury is under way—from the courtroom during that very trial, not from some preliminary or technical stage of the case, but from the very trial of the case itself.

1. *No Litigant Has Ever Been Barred From the Trial of His Cause by a Federal Court.*

This decision is the first of its kind in any federal court that counsel has been able to find. There are many deci-

1. This has clear application here, since plaintiff's physical condition was in issue and was repeatedly referred to during trial—Both Before and *After* her exclusion (244a, 262a).

sions dealing with subsidiary aspects of this problem, where the party litigant was not present, either voluntarily or by physical incapacity from some tangential stage of the proceedings. There are decisions too, where a party's conduct was felt to prejudice or interfere with the trial. The sole remedy in these situations, the law has declared, is a mistrial. 53 Am. Jur. Trial, Sec. 41, 69 A.L.R. 2d 956.

Thus there is no other case where a federal court has banned one of the parties from the very trial itself. Where a federal court has prohibited that party from being in—or near—the courtroom while testimony was being given, for and against her cause; while her condition was being discussed and questioned, and while the jury was looking, listening and gathering the facts.

If the decision below stands, it must inevitably have a fundamental and far-reaching effect on the entire federal judicial system and on the entire system of American justice as guaranteed by the Constitution. It will expose plaintiffs to attacks upon their right to be present during their trials and invade their constitutional right to trial by jury.

Petitioner believes that the Constitution is clear in its use of the word "right". It is a right granted unequivocally and unimpaired to all. The right is subject to no discretion or erosion. Nor is it even relevant to consider the extent of the violation, it is only the fact of violation that counts.[2] *Patton v. U. S.*, 281 U. S. 276 (1930).

In any event, however, this case involves a question too profound and too fundamental to be allowed to stand without review and determination by this Court. Before this precedent gets out of hand, this Court should, in the public interest, hear the merits.

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2. The court below ignored this fundamental precept and attempted to justify its decision on the grounds that plaintiff had had "substantial justice," that her "substantial rights" had been preserved, and that the jury had "become knowledgeable of the physical and mental condition of the child" (38a).

2. *Conflicts With This and Other Courts.*

In *Shields v. United States*, 273 U. S. 583, 71 L. Ed. 787 (1927), the jury was returned to the courtroom for instructions and subsequently exchanged written notes with the Court. Neither the petitioner nor his counsel were present when the jury returned, nor were they advised of the communications at the time. The Court of Appeals for the Third Circuit affirmed, on the grounds that counsel had agreed that the jury be held in deliberation until they had reached a verdict. The court was influenced also by the desire to accomplish "the avoidance of abortive mistrials and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it . . ." 17 F. 2d 66, 69 (3d Cir. 1927).

But this Court was not impressed with these considerations of expendiency. Instead, speaking through Mr. Justice Taft, this Court held that these factors:

> "did not justify exception to the rule of orderly conduct of jury trial entitling the defendant especially in a criminal case to be present from the time the jury is impaneled until its discharge after rendering the verdict." (273 U. S. at 588)

This Court ruled also that no part of the orderly conduct of a jury trial could be effected without giving "the defendant and his counsel an opportunity to be present in court . . ." (273 U. S. at p. 587).

This Court cited its earlier decision in *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 39 S. Ct. 435 (1919), which granted a new trial because of a written instruction sent to the jury room by the court "in the absence of the parties and their counsel and without their consent . . ." (273 U. S. at p. 588).[3]

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3. This is the universal rule. For example (53 Am. Jur., Trial, Sec. 24):

> "A party to a civil action who is not in default is entitled to be present in the courtroom, and to be represented by counsel at all stages during the actual trial of the action."

As a logical and necessary corollary, not even the honored rule of sequestration may be applied to a party to the action. See, e.g., *Coonan v. B. & O.*, 25 F. Supp. 834 (E. D. Pa. 1938); *Poliafico v. U. S.*, 237 F. 2d 97 (6th Cir. 1956), cert. denied, 352 U. S. 1025, 1 L. Ed. 2d 59, rehearing denied, 353 U. S. 931, 1 L. Ed. 2d 725; *Carrado v. U. S.*, 210 F. 2d 712 (C. C. Cir. 1954). Cf. *Twachtman v. Connelly*, 106 F. 2d 501, 507 (6th Cir. 1939), where the plaintiff's husband was sequestered, the court pointing out that he was *not* a party to the action.

Even where a party's conduct at the trial interfered in some way, no court has ever banished a litigant from the courtroom.[4] As already noted, the sole remedy where the court concludes that a litigant's conduct either prejudices or interferes with the trial is a mistrial. 53 Am. Jur., Trial, Sec. 41; 69 A. L. R. 2d 956.

The conflict with the Court of Appeals for the Eighth Circuit involves *Chicago Great Western Ry. Co. v. Beecher*, 150 F. 2d 394 (8th Cir. 1945), a negligence action on behalf of an infant less than three years old where the trial court had denied defendant's request to exclude the infant plaintiff from the courtroom during the trial because (150 F. 2d at p. 399):

> "I know of no rule of law which authorizes the court to exclude plaintiff, defendant, or any litigant from the court room."

This ruling was upheld on appeal, the court noting that counsel had cited no authority to support the requested

4. It is significant too that the record is undisputed that the alleged "bad decorum" occurred only *outside* the courtroom. The court's order of September 23, 1963 states that "while in the courtroom, her mother or her father was always in attendance of the child and would maintain a fair degree of quietness and a fair degree of proper decorum" (337a). The court's order talks only of "bad decorum" while in the hallway (338a). Plaintiff's banishment and the court's denial of counsel's motion for her readmission were thus based on a record of proper conduct in the courtroom at all prior times.

exclusion and the court had found none. Neither has there been any citation of such authority at any stage of this case. Petitioner contends that there is none, that this is a new and dangerous precedent, and that the public interest requires review by this Court.

The Third Circuit had previously applied the rule laid down by this Court in *Shields v. United States, supra*, in a case where the court sent supplementary written instructions to the jury in the absence of plaintiff or his counsel.[5] *Arrington v. Robertson*, 114 F. 2d 821 (3d Cir. 1940). After quoting the key phrase from the *Shields* opinion ("in the absence of the parties and their counsel"), the court concluded (114 F. 2d at p. 823):

> "We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or the propriety of the instruction given."

Finally, there is *no* decided case where an appellate court has ruled that a litigant can be excluded from the courtroom. Quite the contrary, cases are legion where appellate courts have repeatedly reaffirmed the litigant's right to be present at all times during the trial of the case. We have found and note in the margin clear-cut decisions from the highest courts of thirteen states.[6] In substantially all of them, the request to banish a party was grounded on

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5. The use of the alternative in the phrase "plaintiff or counsel" is not significant here when the trial was still under way when plaintiff was banished.

6. *Ryan v. Couch*, 66 Ala. 244, 248 (1880); *Chester v. Bower*, 55 Cal. 46, 48 (1880); *Georgia R. & Banking Co. v. Tice*, 52 S. E. 916, 919 (Ga. 1905); *Tift v. Jones*, 52 Ga. 538, 542 (1874); *Florida Greyhound Lines v. Jones*, 60 So. 2d 396 (Fla. 1952); *Odum v. Com. Products Refining Co.*, 173 Ill. App. 348 (1912); *Larve v. Russell*, 26 Ind. 386, 387 (1866); *McIntosh v. McIntosh*, 79 Mich. 198 (1890); *French v. Sale*, 63 Miss. 386 (1885); *Bryant v. Kansas City Ry. Co.*, 286 Mo. 342; *Crowe v. Peters* 63 Mo. 429 (1876); *Leed v. Robt. Joshua, Ltd.*, 72 N. Y. S. 2d 3 (1947); *East Ohio Gas Co. v. Van Orman*, 179 N. E. 147 (Ohio, 1931); *Streeter v. Evans*, 44 Vermont 27 (1871).

the facts that (1) the party could not, by age or condition, testify or in any other way participate in or contribute to the trial, and (2) his presence might tend to prejudice the jury or otherwise interfere with the smooth conduct of the trial.

Without a single exception, every court has refused to banish a party from the courtroom during the trial of the case. Typical of this legion of cases is *Leonard's of Plainfield, Inc. v. Dybas*, 130 N. J. L. 135 (N. J. 1943), where the court said:

> "The right of the parties to the cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury is basic to due process."

CONCLUSION.

For the foregoing reasons, because petitioner has been denied due process of law in the course of denial of her substantive right to trial by jury as guaranteed by the Constitution of the United States, because the judgment below conflicts with decisions of this Court and of other appellate courts (federal and state) in a matter of vital importance to the integrity of our federal judicial system, and because the decision below is the first and only one of its kind, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX.

Opinion of the United States Court of Appeals for the Third Circuit.

(Filed May 14, 1964)

PER CURIAM:

On review of the record we find no error. The judgment of the District Court of February 1, 1963, entered pursuant to the jury's verdict in favor of the defendants will be affirmed.

Judgment of the United States Court of Appeals for the Third Circuit.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of February 1, 1963 of the said District Court in this case be, and the same is hereby affirmed, with costs.

ATTEST:
IDA O. CRESKOFF.

May 14, 1964

Order of the United States District Court for the Eastern District of Pennsylvania Sur Plaintiff's First and Second Motions for New Trial.

And Now, on September 23, 1963, after consideration of the above Motions, the submitted briefs and memoranda of counsel, the record and oral argument, It Is Ordered that the plaintiff's Motions for New Trial be, and the same are, Denied.

Comment.

From the beginning of the trial of this case, counsel for the defendants requested, in order for defendants to have a fair trial, that the court require Carol Tillman, the ward, to be excluded from the courtroom. Defendants' requests were continued from time to time, but they were all denied during the first four days of the trial. At the beginning of the court session on the 5th day, defendants' counsel moved the court to require Carol Tillman to be maintained at some place where her cries and the noise she made would be out of the hearing distance of the jury. From the beginning of the trial of the case, Carol Tillman was in and out of the courtroom from time to time. While in the courtroom, her mother or her father was always in attendance of the child and would maintain a fair degree of quietness and a fair degree of proper decorum. Notwithstanding this fact, the noise she made, both vocal and demonstrative [hands and feet], was distracting to the work of the jury and court. During the 4th day, she was voluntarily maintained immediately outside the courtroom door and in the hall. During the morning of the 5th day, the court observed the cries and the demonstrative noise, such as banging and kicking: thereafter and at the noon recess, the court concluded that such noise was distracting to the work of the jury and the court, and did direct that Carol Tillman be maintained at a proper place at the south end of the corridor, where her cries and noise would not

disturb the decorum of the court. Plaintiff's counsel at the same time moved the court to permit Carol Tillman to be brought back into the courtroom and be permitted to stay in the courtroom throughout the rest of the trial. The motion was denied.

The court finds that the behavior, the cries, the pounding and the kicking on the stroller were disturbing to the work of the jury and the court and that they created a bad decorum situation, that the jury, by the 5th day, had become knowledgeable of the physical and mental condition of the child, and for these reasons the child was directed to be maintained a distance from the courtroom to permit the orderly work of the jury and the court. Counsel for plaintiff at no time after noon on the 5th day asked to bring the child into the courtroom for the purpose of any showing or demonstration. Such a motion would have been granted. The court concludes and therefore holds that substantial justice was had in the trial of this case and the substantial rights of both parties were at all times preserved. Rule 61.

/s/ Bohanon, J.

Judgment of the United States District Court for the Eastern District of Pennsylvania.

Before BOHANON, *J.*:

AND NOW, to wit: February 1st, 1963, in accordance with the Verdict, it is ORDERED that Judgment be and is hereby entered in favor of Defendants, Edward Hoge Vick, M. D., and Clarence C. Briscoe, M. D., and against the Plaintiff, Alvin H. Frankel, Guardian of the Estate of Carol Tillman, a minor, with costs.

By THE COURT:

ATTEST:

s/ R. J. GREENWOOD,
Deputy Clerk.